No. 18-966

In The Supreme Court of the United States

DEPARTMENT OF COMMERCE, *et al.*,

Petitioners,

v.

NEW YORK, *et al.*,

Respondents.

On Writ Of Certiorari Before Judgement To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL COUNCIL OF NONPROFITS, NATIONAL HUMAN SERVICES ASSEMBLY, AND YWCA USA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, for themselves and in their representational capacities, respectfully submit this brief because they have several compelling interests in this case, including the threatened loss of billions of dollars in federal funding and threatened loss of reliable data nonprofit organizations need to make informed, effective operational decisions in the communities they serve during the next decade. *Amici* are charitable nonprofit organizations recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code (hereinafter, "charitable nonprofits"), and as such are nonpartisan by law.

National Council of Nonprofits is a trusted resource that advocates for America's nonprofits nationwide. Through its network of state associations of nonprofits and 25,000-plus member charitable nonprofits, faith-based groups, and foundations – the nation's largest network of nonprofits – it serves as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. It identifies emerging trends, shares proven practices, and promotes solutions that benefit charitable nonprofits and the communities they serve. The membership of the Council of Nonprofits reflects the broad panoply of charitable missions

[1] The parties have consented to the filing of this brief. Written consent is on file with this Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund this brief's preparation or submission.

recognized under Section 501(c)(3), each of which will be affected, either directly or indirectly, by the outcome of this case. As articulated in its Public Policy Agenda for the last two years, the National Council of Nonprofits and all charitable nonprofits have a significant stake ensuring that all persons in every state are counted as part of the 2020 census.

The National Human Services Assembly (National Assembly) is a Washington, D.C.-based association comprised of some of the largest national nonprofit human service organizations. In aggregate, members and their affiliates impact nearly every household in America – as consumers, donors, or volunteers. The work of human service organizations ranges widely from providing opportunities for young people to develop and learn, to supports that help adults with disabilities stay fully engaged in their communities, to places that foster social connections in later life. It also includes ways of shoring up well-being during life's storms – such as the loss of a job or an unexpected illness – as well as ways to maintain or repair well-being, like preventative health and mental health services. The National Assembly represents and advocates for organizations that serve youth, people with disabilities, families, and older adults to build a connected and engaged nation that promotes and supports human services so all people can reach their potential and contribute to vibrant, thriving communities. The ability for each of its members to serve these varied communities will be affected, either directly or indirectly by the outcome of this case.

YWCA USA is a national nonprofit organization dedicated to eliminating racism, empowering women, and promoting peace, justice, freedom and dignity for all. YWCA is one of the oldest and largest women's organizations in the nation, serving over 2 million women, girls, and their families through a network of 215 local associations. YWCA has been at the forefront of the most pressing social movements for more than 150 years. Today, it combines programming and advocacy to generate institutional change in the key areas of racial justice and civil rights, empowerment and economic advancement of women and girls, and health and safety of women and girls. Federal funding is a major source of revenue that supports domestic violence, housing, child care, nutrition, and other programs across YWCA's national network.

In 2020, the U.S. Census Bureau will conduct the decennial census mandated by the U.S. Constitution. A fair, accurate, and complete count of all persons is important for our democratic institutions as the census determines how representatives are apportioned among the several states and how hundreds of billions of federal dollars are allocated annually to states and localities for key programs, many of which are administered through charitable nonprofits. Undercounts of individuals that charitable nonprofits serve can lead to inadequate funding, which in turn puts more pressure on charitable nonprofits, state and local governments, and private philanthropy in undercounted areas to stretch their limited resources even more to address increased unmet needs.

The 501(c)(3) community – charitable nonprofits, houses of worship, and private foundations – has a significant stake in ensuring that all people in the United States are counted as part of a fair, accurate, and complete census in 2020. Charitable organizations are dedicated to the public good; their work serving people and solving community problems improves lives, strengthens communities and the economy, and lightens the burdens of government, taxpayers, and society as a whole.

Charitable nonprofits operate in every community in our country, whether educating children, caring for returning soldiers, rebuilding cities, nursing the sick, providing safety for domestic violence survivors, training the workforce, supporting our elders, elevating the arts, mentoring our youth, protecting natural resources, nurturing our faith and spirituality, promoting diversity, equity, and inclusion, and much more. In virtually every city and town in America, charitable nonprofits are the front-line providers of services; as organizations grounded in their communities, charitable nonprofits have a stake in the strength and well-being of the economy and governments at all levels. Likewise, given the vital role nonprofits play in both the economic and social well-being of our nation, society has an equally strong stake in ensuring that charitable nonprofits are healthy and able to fulfill their missions in support of the public good.

The large number and broad scope of America's charitable nonprofits surprise many people. More than 1.3 million charitable nonprofits feed, heal, shelter, educate, inspire, enlighten, and nurture people of every

age, gender, race, and socioeconomic status, from coast to coast, border to border, and beyond. Nonprofits employ 12.5 million people, which is 10.2 percent of the private workforce, making the sector the third largest private employer in the country – larger than manufacturing, construction, finance and insurance, transportation, real estate, and agriculture. U.S. BUREAU OF LABOR STATISTICS, *Research Data on the Nonprofit Sector, 2017 Annual Averages* (March 2019).

There is no standard source of revenue for charitable nonprofits; the mix varies widely between organizations based on a variety of factors. The charitable nonprofit sector as a whole earns almost a third (32.5 percent) of its revenues by performing services pursuant to government grants and contracts. See generally NATIONAL COUNCIL OF NONPROFITS, *America's Nonprofits – Myths About Nonprofits*, https://www.councilofnonprofits.org/myths-about-nonprofits.

Despite the collective size of the sector, most charitable nonprofits are relatively small: 97 percent have budgets of less than $5 million annually, 92 percent operate with less than $1 million per year, and 88 percent spend less than $500,000 annually for their work.[2] The "typical" charitable nonprofit is community-based, serving local needs. Accordingly, it should be no surprise that relatively few charitable nonprofits have an

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[2] INTERNAL REVENUE SERVICE, Business Master Files, Revenue Transaction Files and Electronic (e-File) Form 990 returns for fiscal year 2016 (June 2018).

endowment upon which to rely when revenue shortfalls occur. Indeed, most charitable nonprofits have limited reserves – about 50 percent have less than one month of cash reserves, according to one analysis of nonprofit financial records. See OLIVER WYMAN AND SEACHANGE CAPITAL PARTNERS, *The Financial Health of the United States Nonprofit Sector* (Jan. 2018).

An unfair, inaccurate, and incomplete count by the federal government poses significant threats to the work of charitable nonprofits.

SUMMARY OF ARGUMENT

At its core, this case concerns whether the American people, and the States, can trust their federal government to provide accurate data about the country.

1. The census exists to be a fair and impartial mechanism to count the people in the United States, a purpose driven deeper and clearer through the Fourteenth Amendment's requirement to count "all persons" fully. That count is used to allocate, according to the established laws, political power as well as public resources; anything less than a fair, accurate, and complete count undermines the ability of charitable nonprofits to provide vital services and breaches the public's trust in their government.

2. The Census Act gives the Commerce Secretary discretion regarding many things, but not whether to

comply with statutory deadlines for taking and reporting specific actions to Congress and thereby the public. Pursuant to the Constitution's Enumeration Clause, Congress has directed the manner in which the decennial census is to be conducted, including mandating specific deadlines for the Secretary to take certain actions. Those deadlines, set in a certain sequence, ensure there is adequate time to do the requisite planning and other activities, such as conducting tests and resolving any disputes. The Secretary may not ignore statutory deadlines set by Congress. Here, when Secretary Ross did not disclose his intention to add citizenship as a subject of the 2020 census until 360 days past the statutory deadline, he violated the Census Act and acted in an arbitrary and capricious way.

3. The Administrative Procedure Act is a legal mechanism to hold federal agencies accountable if they fail to act reasonably and in accordance with law. The APA prohibits federal agencies from acting in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," and "without observance of procedure required by law." 5 U.S.C. § 706(2). Here, the record reflects that Secretary Ross violated the APA in an alarming number of ways, including ignoring a fundamental statutory deadline, ignoring factual information, and substituting his own personal desires over facts.

4. The public needs, deserves, and is constitutionally entitled to a decennial census that is fair, accurate, and complete. For our democracy to work fairly,

our public resources to be allocated accurately, and our decisions to be made wisely, we need data from a census count that is reliably accurate and complete. Yet uncontested evidence proves that inserting the untimely and untested citizenship question into the 2020 census will produce a count that is unfair, inaccurate, and incomplete, harming the American people, charitable nonprofits, governments, and businesses.

This Court should affirm the district court's decision and keep the citizenship question off the 2020 census.

ARGUMENT

I. Adding a Citizenship Question to the 2020 Census Would Lead to an Inaccurate Count and Undermine the Ability of Charitable Nonprofits to Provide Services

Honoring this Court's Rule 37.1, we will not repeat what Respondents and other *amici* will have brought to the Court's attention regarding the many reasons why and how the citizenship question will lead to an avoidable undercount, harming people and communities. We simply note that, as the district court found, the fears are well-grounded that adding a citizenship question would depress responses among people who fear that the government would use that information against them. More specifically, the court found that "the addition of a citizenship question will cause an

incremental differential net undercount of people who live in noncitizen households of approximately 5.8%, and likely more" and "that the citizenship question will cause a nonzero net undercount of Hispanics." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 592 (S.D.N.Y. 2019).

The undercount resulting from the citizenship question will hurt *amici* and all charitable nonprofits throughout the country in significant ways. Chief among those are a loss of funding for their work, a loss of data and effectiveness, and a loss of faith in democracy and government.

A. Impact on Dollars and Sustainability

For every person the census fails to count, fewer dollars are allocated to the community where the person lives, thwarting the intent of Congress to allocate resources in a fair and reasonable manner. Moreover, when federal resources are withheld due to undercounts, it unfairly shifts the federal government's financial responsibilities for helping the public onto the backs of charitable, religious, and philanthropic organizations. Here's how.

The federal government utilizes census data to apportion approximately $900 billion annually in federal funds among states and localities. *Id.* at 596. State and local governments regularly use those funds to hire nonprofit organizations to deliver the services.

See generally URBAN INSTITUTE, *Nonprofit-Government Contracts and Grants: Findings from the 2013 National Survey* (Dec. 2013); see also NATIONAL COUNCIL OF NONPROFITS, *Government-Nonprofit Contracting Reform*, https://www.councilofnonprofits.org/trends-policy-issues/government-nonprofit-contracting-reform. Indeed, the federal government recognizes that "Federal, state and local governments rely on nonprofit organizations as key partners in implementing programs and providing services to the public, such as health care, human services and housing-related services." U.S. GOVERNMENT ACCOUNTABILITY OFFICE ("GAO"), *Nonprofit Sector: Treatment and Reimbursement of Indirect Costs Vary among Grants, and Depend Significantly on Federal, State, and Local Government Practices*, Report 10-477 (May 2010). It therefore follows that census undercounts could prove devastating to the work and sustainability of tens of thousands of nonprofit organizations across the country – as well as to governments that hire them to deliver services and to the tens of millions of people who depend on nonprofits to provide those services.

If the federal government fails to count a person in the 2020 census, the person still exists. The uncounted child still attends school, the uncounted veteran still needs a home, the uncounted farmer still uses roads and bridges, and the uncounted widow still needs her doctor. Yet because the federal government uses census data to allocate funds across the states for education, housing, transportation, and health care (and much more), appropriate funds will not be sent to

the state where the child, veteran, farmer, widow, and multiple thousands of others who are uncounted live. For every person not counted, a state will lose between $533 to $2,309, annually, or roughly $5,000 to $23,000 decennially per person; an undercount of 100,000 people in some states could mean losses of more than a billion dollars for programs and services. See Andrew Reamer, George Washington Institute of Public Policy, *Counting for Dollars: The Role of the Decennial Census in the Geographic Distribution of Federal Funds* (March 19, 2018).

When the child, veteran, farmer, widow, and others are not counted, a red X is not painted on their forehead signifying they cannot participate in programs they need for the next 10 years. Rather, their underlying human needs continue. The 100,000 people not counted will still turn to charitable nonprofits, as will the 900,000 who were counted. But now the census-apportioned funding for 900,000 will be stretched to cover all one-million people. Charitable nonprofits with government grants and contracts cannot possibly fill the resulting financial gaps for governments' increasingly underfunded programs like anti-poverty, education, emergency food assistance, health care, affordable housing, public improvements, social services, and much more.

Charitable nonprofits do not have the authority, capacity, or scale to fill the resulting financial gaps if the upcoming census is conducted in a way that is unfair, inaccurate, and incomplete.

Census undercounts also hurt charitable nonprofits that have no government grants or contracts. Just as a red X is not painted on the forehead of uncounted individuals, a green dollar sign is not painted on the doors of nonprofits with government grants and contracts. People in need seek help wherever they can find it. Consider SNAP (Supplemental Nutrition Assistance Program, formerly known as the Food Stamp Program), which distributes funding to the states based on census data. States run the SNAP program, not nonprofits. Nevertheless, if an inaccurate census count means that a state's SNAP funding allocation is reduced significantly, then demands will increase on charitable nonprofits to fill the gaps – and not just on nonprofit food banks, soup kitchens, and emergency shelters. Hungry people must eat, so they may choose to use their limited money to buy food instead of needed medication, housing, or transportation to a job. Those individuals invariably turn to their local, non-food related nonprofits for assistance. Similarly, donations to the arts, education, and other non-urgent missions fall as donors try to compensate for government's failures by diverting their contributions to direct human services. These and thousands of other examples demonstrate how all charitable nonprofits, regardless of mission and focus area, are affected when the census fails to count every person.

B. Impact on Data and Effectiveness

Charitable nonprofits are on the front lines of our nation's most vexing challenges. They depend on the

federal government to follow its own laws and conduct the 2020 census properly because the resulting data will influence planning and operational decisions by nonprofit organizations. Undercounts do not simply leave numbers out; they mask and skew the true numbers, essentially corrupting the data that are reported. Using corrupted data would erode the effectiveness of charitable nonprofits and thereby hurt the individuals and communities that nonprofits serve.

In this era of data-driven decisions, the need for quality census data for planning purposes is universal. "Businesses use census data to decide where to build factories, offices and stores, and this creates jobs. Developers use the census to build new homes and revitalize old neighborhoods." Jack Fitzpatrick, *Census May Take Hit as Business Data, Redistricting at Stake*, BLOOMBERG NEWS, Aug. 16, 2017. Governments use census data to determine such things as where they need to start (or stop) building highways and schools.

Just as for-profit entities and governments depend on access to quality census data, nonprofit organizations also rely on quality census data to better meet the needs of those they serve. Notably, nonprofit institutions with larger physical footprints – such as nonprofit hospitals, regional food banks, and even houses of worship – need accurate census data for a variety of reasons, including to decide whether and how much the specific populations they serve are growing, shrinking, or moving. Should the nonprofit hospital add a new wing for pediatrics or geriatrics? Or is population growing elsewhere, making it wiser to

construct another facility there? Should the food bank do more fundraising to renovate its worn-down facility, or is the population served shifting to another part of the region such that the food bank should buy a facility that is closer? Should the house of worship buy the nearby property with hopes of building a school campus to accommodate younger families, or is the overall population aging so it should consider building a retirement center instead – or should it buy vans rather than real estate, investing in a mobile ministry to serve a shrinking, aging population?

Flawed census data will not only distort for-profit business planning and warp governmental infrastructure decisions, but also undermine the effectiveness of charitable nonprofits. And those negative consequences will compound harm throughout the coming decade (and beyond).

C. Impact on Democracy and Trust in Government

Many entities filing briefs in this litigation understandably have focused on the importance of a quality census for reapportionment of Congress and redistricting of state and local governments. But fair distribution of political power is not the only thing at risk for democracy from an unfair, inaccurate, and incomplete census count.

Throughout our nation's history, nonprofit organizations have played a vital and unique role in promoting democracy. From before the time our nation was

formed through today, individuals have assembled through associations (modern-day nonprofits) to advocate for the advancement of the issues of their times. Alexis de Tocqueville marveled how "Americans of all ages, all conditions, and all dispositions constantly form associations . . . religious, moral, serious, futile, very general and very particular, immensely large and very minute." Alexis de Tocqueville, DEMOCRACY IN AMERICA, Volume II, ch. 5 (1840). As safe havens for people to gather to address shared concerns and community challenges, charitable nonprofits serve as vehicles for individuals to assemble and amplify their collective voices. Through charitable nonprofits, people stand up and speak out for the public good, often providing a voice for those individuals and groups who are unable to speak for themselves. Likewise, charitable nonprofits share the responsibility to promote greater engagement of the citizenry, civic dialogue, open elections, and open government.

When people come together through charitable nonprofits to pursue common goals, they engage with each other, learn more about their community's strengths and challenges, and develop their skills in community problem-solving. "[T]he nonprofit sector is the doorway through which millions of Americans pursue a diverse array of cultural, social, political, and religious beliefs through civic opportunities that are the hallmark of a healthy democracy. . . . [N]onprofits are well positioned to show through their work how democracy is more than a lofty construct; it's the

stream from which every attempt to solve public problems and make the world a better place flows." Cynthia M. Gibson, *Nonprofits: The DNA of Democracy*, THE NONPROFIT QUARTERLY, Winter 2008.

Charitable nonprofits provide a nonpartisan space where people can gather to focus on building and providing community through civic engagement, free from the rancor of partisanship that too often divides and distracts. The emphasis here is on *nonpartisan* and the special role that nonprofits play in local communities. Political parties and candidates promote themselves, while charitable nonprofits frequently are the only unbiased source of information in communities. Whether by registering newly eligible voters (e.g., through engagement on National Voter Registration Day, run by a nonprofit), hosting nonpartisan candidate forums (e.g., League of Women Voters or state associations of nonprofits), or educating children about what it means to be an engaged citizen (e.g., the iCivics curriculum championed by former Justice O'Connor), charitable nonprofits are key players in making our democracy work.

A census that is not fair, accurate, and complete would undermine public trust in government and adversely affect the ability of charitable nonprofits to engage the public.

II. The Secretary's Untimely Attempt to Add a Previously Undisclosed Subject to the 2020 Census Ignored the Census Act and Violated the Administrative Procedure Act

The Constitution directs Congress to prescribe in law the manner in which the decennial census will be conducted. See U.S. CONST. art. I, § 2, cl. 3 (the number of people shall be determined by an "actual Enumeration . . . *in such Manner as [Congress] shall by Law direct*") (emphasis added).

Honoring that constitutional directive and recognizing both the enormous importance of the decennial census ("one of the most critical constitutional functions our Federal Government performs"[3]) and the enormity of the task ("a complex and vast undertaking"[4]), Congress has directed the manner in which the Secretary of the Department of Commerce is to conduct the decennial census. See generally 13 U.S.C. §§ 1 *et seq.* ("Census Act"). Note that when directing the Secretary to complete particular tasks before specific deadlines, Congress used mandatory language, not discretionary language:

- The Secretary "*shall*" furnish the state officers or public bodies having initial responsibility for the legislative apportionment or districting the criteria for those entities to identify the geographic areas

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[3] Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2480 (Nov. 26, 1997) ("1998 Appropriations Act"), Finding No. 5.

[4] *Id.*, Finding No. 8.

for which specific tabulations of populations are desired, "*not later than*" April 1 of the fourth year preceding the decennial census date. 13 U.S.C. § 141(c) (emphasis added).

- The Secretary "*shall*" submit to the committees of Congress having legislative jurisdiction over the census a report containing the Secretary's determination of the subjects proposed to be included in the census, "*not later than*" April 1 three years before the census date. 13 U.S.C. § 141(f)(1) (emphasis added).
- The Secretary "*shall*" submit to the committees of Congress having legislative jurisdiction over the census a report containing the Secretary's determination of the questions proposed to be included in such census, "*not later than*" April 1 two years before the census date. 13 U.S.C. § 141(f)(2) (emphasis added).
- The Secretary "*shall*" complete the tabulation of total population by states and report it to the President "within 9 months after the census date." 13 U.S.C. § 141(b) (emphasis added).

A. The Statutory Deadline for Identifying the Subjects of the Census – April 1, 2017 – Bars Adding a Citizenship Question 360 Days Late

This case can be resolved by simply looking at one fact and one statute: Did Secretary Ross submit to Congress before the statutory deadline of April 1, 2017, "a report containing [his] determination" that citizenship be among "the subjects proposed to be included, and the types of information to be compiled, in" the 2020 census?

The irrefutable answer is no.

Straightforward principles of statutory construction mandate that answer. The applicable statute's subsection, 13 U.S.C. § 141(f)(1), uses mandatory language: "the Secretary *shall* submit."[5] The statute also uses the imperative instruction of "*not later than*," plain language that cannot be any clearer: to be done on or before April 1 of the given year. Here, "not later than 3 years before the appropriate census date" means by or before April 1, 2017. The Section 141(f)(1) report that Secretary Ross submitted to Congress before April 1, 2017, did not mention citizenship as a subject proposed to be in the 2020 census. End of case.

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[5] That same statute also uses the discretionary language of "may," showing Congress knew in the context of the Census Act the difference between mandatory and discretionary. See 13 U.S.C. § 141(a) ("The Secretary . . . *may* determine" the decennial census "form and content.") (emphasis added).

Diving deeper into the record reinforces the district court's conclusion that the Secretary violated the statutory deadline by identifying another proposed subject – citizenship – 360 days too late.

> Feb. 27, 2017: U.S. Senate confirmed Wilbur Ross as Secretary of Commerce.[6]
>
> March 1, 2017: Secretary Ross was briefed on the 2020 census and the upcoming deadline to notify Congress about the proposed subjects for the census questionnaire.[7]
>
> March 10, 2017 (or earlier): "Secretary Ross asked his Deputy Chief of Staff and Director of Policy . . . why there was no citizenship question on the census."[8]
>
> March 28, 2017: The Section 141(f)(1) report submitted to Congress identified only five "subjects" for the 2020 census: Age, Gender, Race/Ethnicity, Relationship, and Tenure (Owner/Renter).[9] It did not identify citizenship as a subject for the decennial census.

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[6] See 163 CONG. REC. S1421, S1455 (2017).

[7] *New York*, 351 F. Supp. 3d at 549.

[8] *Id.*

[9] The Commerce Department posted the Section 141(f)(1) report on its website on March 28, 2017. The report acknowledges on the first page:

> "Section 141(f) of the Census Act *requires* that the subjects to be included in the next census be submitted *no later than 3 years before the census date*. The contents of this handbook describe the subjects that will be asked on the 2020 census" (emphasis added).

> March 26, 2018: "Secretary Ross announced he was reinstating the citizenship question on the 2020 census questionnaire." *New York*, 351 F. Supp. 3d at 515.

Thus, Secretary Ross contemplated having a citizenship question on the census questionnaire weeks *before* the statutory deadline of notifying Congress and thereby the public by April 1, 2017. He could have included the subject of citizenship on a timely basis. But for whatever reason, Secretary Ross did not notify Congress before the statutory deadline of April 1, 2017 of his desire, intent, or determination to add citizenship as a subject for the 2020 census. On that day, the door closed preventing the addition of a question on citizenship, a question on sports preferences, or a question on any other subject not identified in the Secretary's 2017 Section 141(f)(1) report. Once again, end of case.

The Census Act does provide a safety valve for a Commerce Secretary to respond to an unforseen, emergency development – "new circumstances" – that would legitimately "necessitate" modifying the Secretary's previous submissions to Congress about the census. See 13 U.S.C. § 141(f)(3) ("after submission of [an earlier] report . . . *if* the Secretary *finds new circumstances* exist which *necessitate* that the subjects, types of information, or questions" identified in earlier submitted reports be altered, then the Secretary may

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U.S. CENSUS BUREAU, *Subjects Planned for the 2020 Census and American Community Survey* (March 2017); https://www.census.gov/library/publications/2017/dec/planned-subject-2020.acs.html.

submit a report identifying the subjects, types of information, or questions the Secretary proposes should be modified) (emphasis added).

But that safety valve does not grant the Secretary *carte blanche* authority to unilaterally negate the terms of an Act of Congress or arrogate to himself the power to frivolously, deviously, or otherwise add or change subjects or questions on the census. Rather, Congress limited that extraordinary relief only to situations when "the Secretary *finds new circumstances* exist which *necessitate*" modifications. 13 U.S.C. § 141(f)(3) (emphasis added). Secretary Ross did not, and cannot, meet that high bar for late changes to the census. He submitted no findings. There are no legitimate "new circumstances" – he had contemplated the citizenship question in March 2017 *weeks before* the statutory deadline. And there is nothing new that "necessitates" adding the citizenship question on the basis he now alleges: that the Department of Justice asked him to add a citizenship question to provide DOJ information to enforce the Voting Rights Act of 1965. That assertion is belied by the Secretary's own admission conceding that DOJ did not, in fact, initiate the request; rather, Secretary Ross and his staff orchestrated the scheme and persuaded the Attorney General to ask that the question be added, all to give the pretense that there was something new to justify adding citizenship to the decennial census, when there was not. See *New York*, 351 F. Supp. 3d at 516.

B. The Secretary Violated the Administrative Procedure Act by Attempting to Add a New, Previously Undisclosed Subject to the 2020 Census, and through Multiple Other Acts

The Administrative Procedure Act (APA) exists in part to hold federal officials accountable for their actions. Among other things, the APA prohibits federal agencies from acting in a manner that is "not in accordance with law" and "without observance of procedure required by law." See 5 U.S.C. § 706(2)(B), (D).

On March 26, 2018 – 360 days *after* the deadline had expired for identifying the subjects to be included in the census – Secretary Ross publicly informed Congress for the first time, via his Section 141(f)(2) report identifying questions to be included in the census, his intent to add a citizenship question to the 2020 census. *New York*, 351 F. Supp. 3d at 528-529.

As noted above, through the Census Act, Congress has imposed mandatory deadlines by which the Secretary must complete certain actions. Secretary Ross cannot ignore statutory deadlines. To do so would be (and was) an action "not in accordance with law" and "without observance of procedure required by law." 5 U.S.C. § 706(2)(B), (D). It is not the prerogative of cabinet members or any other public servant to pick and choose which statutory obligations to honor and which to ignore. This Court should not allow Secretary Ross to operate under a separate set of rules.

Timeliness for its own sake is not the point. Rather, Congress recognized that "the decennial enumeration of the population is a complex and vast undertaking." 1998 Appropriations Act, Finding No. 8. By setting specific deadlines for the Commerce Secretary to take particular actions in a sequenced order, Congress has ensured that the massive decennial census will not fall prey to procrastination or ineptitude in planning. The sequenced, mandatory deadlines make sure proper attention will be devoted to the vital actions necessary for a smooth census process.

The statutory mandate to disclose not later than three years in advance of the next census the subjects and items to be compiled serves multiple purposes. For instance, advance disclosure of the subjects to be included ensures there is adequate time to plan for and execute the in-depth statistical and field testing required to avoid unintended problems. Done properly, it would mean that the Secretary and Census Bureau were communicating about important details – something that did not occur here because the Secretary concealed the citizenship subject from his own agency. *New York*, 351 F. Supp. 3d at 566-567, 572-573. Also, disclosure of the subjects allows time during the third year out for proper internal testing of potential questions – the precise words and the order on the questionnaire – so everything can be ready in time for both the Secretary to submit a timely Section 141(f)(2) report two years in advance of the census and the external field testing can be primed for implementing.

By disregarding the April 2017 deadline mandated by Congress, Secretary Ross prevented proper testing of the citizenship question in the field. *Id.* at 572. As six former Census Directors who served under Republican and Democratic administrations warned:

> Preparations for a census are complex, with each component related to and built upon previous research and tests. . . . Adding a citizenship question without a testing opportunity in a contemporary, census-like environment will invalidate the results and lessons learned from the End-to-End test. Key assumptions underlying estimates of self-response, staffing needs, local office sites, and communications strategies will no longer be sound. . . . It is highly risky to ask untested questions in the context of the complete 2020 Census design. There is a great deal of evidence that even small changes in survey question order, wording, and instructions can have significant, and often unexpected, consequences for the rate, quality, and truthfulness of response.[10]

Here, Secretary Ross's delinquent disclosure was so untimely that the "one 'end-to-end' test – in essence, a form of dress rehearsal – conducted for the 2020

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[10] *New York*, 351 F. Supp. 3d at 541 (citing AR 8555-56; Former Directors of the U.S. Census Bureau, Letter to Secretary Wilbur Ross, Jan. 26, 2018, https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/03/27/Editorial-Opinion/Graphics/DOJ_census_ques_request_Former_Directors_ltr_to_Ross.pdf?tid=a_mcntx).

census did not include the citizenship question." *New York*, 351 F. Supp. 3d at 559.

But providing adequate time for resolution of the possible subjects is not the only potential harm Congress was mitigating when it mandated the reporting schedule. When Congress mandated that the Commerce Secretary "shall" submit the Section 141(f)(1) report to the committees of Congress having legislative jurisdiction over the census, rather than having it filed under seal, it made sure that the public also saw the proposed census subjects three years in advance. Congress knew that if the census were "conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted." 1998 Appropriations Act, Finding No. 8. That three-year advance notice requirement makes sure there is adequate time to resolve any legal disputes regarding the proposed subjects to be explored and proposed data to be collected.

Indeed, this very case illustrates the hazards and harms when government officials ignore mandatory statutory deadlines. Secretary Ross improperly withheld formal disclosure of his intent to include citizenship on the decennial census until March 26, 2018 – 360 days past the statutory deadline. Respondents and the other governments, organizations, and individuals moved expeditiously to challenge the Secretary's actions. Any legal actions filed earlier would have been

premature and dismissed as being not judiciable. Within weeks, a total of five lawsuits were filed across the country.[11] Yet because Secretary Ross withheld disclosing his intent to add the citizenship question for almost a full year after the firm deadline set by Congress, this case is now before the Court on an emergency basis (yet again), without the benefit of additional winnowing and analysis by the Second Circuit, the full California district court case, the Ninth Circuit, the Maryland district court, or the Fourth Circuit. As noted, Congress presciently foresaw that meaningful judicial relief would be impractical after the fact if the census were not conducted in compliance with the legal requirements set by Congress, so it imposed the three-year public notice of subjects to give adequate time to resolve any disputes. 1998 Appropriations Act, Finding No. 8. This statutory requirement is not a mere suggestion by Congress, but a mandatory requirement. This is not a situation of no harm, no foul. The Secretary unquestionably fouled by flouting the law, and there has been harm.

That was not the only violation of the APA. After trial, the district court found and concluded that Secretary Ross operated outside the law in multiple ways, including: "He failed to consider several important

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[11] The underlying case here, plus *California v. Ross*, Case No. 3:18-cv-0186 (N.D. Cal. filed March 26, 2018); *Kravitz v. Dep't of Commerce*, Case No. 18-cv-01041 (D. Md. filed April 11, 2018); *San Jose v. Ross*, Case No. 5:18-cv-02279-HRL (N.D. Cal. filed April 17, 2018); and *New York Immigration Coalition v. Dep't of Commerce*, Case No. 18-cv-01041 (S.D.N.Y. filed June 6, 2018).

aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices – a veritable smorgasbord of classic, clear-cut APA violations." *New York*, 351 F. Supp. 3d at 516.

III. The Court Should Affirm the District Court's Decision Because the Untimely and Untested Citizenship Question Will Harm the Nation

Legal cases are not decided in a vacuum. Context matters. Here, the already fragile 2020 census is at risk even without the citizenship question. All factors militate that the Court affirm, thereby keeping the harmful citizenship question out of the decennial census.

Experts harbor significant concerns that aspects of the 2020 census are so amiss that they pose a serious risk of not getting it right and hurting our country. Since 2017, the U.S. Government Accountability Office has deemed the 2020 census a "high risk" program, and only weeks ago GAO identified the 2020 census as one of the most high-risk areas in the entire federal government. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SUBSTANTIAL EFFORTS NEEDED TO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS, GAO-19-157SP (March 6, 2019) ("GAO High-Risk Report"). GAO warned that

because the Census "Bureau cancelled the field portion of the 2017 test and then conducted a full operational test in only one site" and "did not test all 2020 census systems and IT capabilities during its operational test," there is increased "risk that innovations and IT systems will not function as intended." *Id.* In short, the cancellation of all those tests and dry runs means that the Census Bureau did not have a chance to fully test its approach, assumptions, and cybersecurity systems.

For the first time in the nation's history, the decennial census will be conducted digitally. This approach is a radical change from the paper format used for almost 230 years. In making this radical change, the Census Bureau concedes it has been facing "unprecedented challenges." U.S. CENSUS BUREAU, *2020 Decennial Census Program Overview*, Census Bureau website. Here is a partial listing:

Digital Divide: The "digital divide" in the United States is real, with 16 percent of all adults in the U.S. population *not* using the internet, including 42 percent of all seniors and 22 percent of rural residents. See Andrew Perrin and Maeve Duggan, *Americans' Internet Access*, PEW RESEARCH CENTER, June 26, 2015. Three years later, that same percentage of adults living in a rural area (22 percent) say they never go online, and a third of adults in rural areas do not own mobile devices like smartphones to use the internet. Monica Anderson, *About a Quarter of Rural Americans Say Access to High-Speed Internet Is a Major Problem*, PEW RESEARCH CENTER, Sep. 10, 2018. The lack of connection

for this, and other populations, poses a significant challenge for an accurate count.

Cybersecurity Concerns: The 2020 census "involves collecting personal information from over a hundred million households," and the Census Bureau found as recently as December 2018 that nearly 1,100 system security weaknesses need to be fixed. GAO High-Risk Report. Getting a complete count will be challenging if people refuse to complete the census electronically for fear that their responses might be hacked to steal their identities or pinpoint their physical locations. Their concerns may be well grounded, given general awareness of large-scale data breaches in recent years of what should be the most sensitive and well-guarded electronic records, including the White House, Defense Department, and Office of Personnel Management.

Inadequate Field Testing: Past census officials confirm that new questions and systems require testing or unintended and unexpected results will occur. Yet the shift to an electronic census enumeration has not been subjected to appropriate testing, adjustments, retesting, and the like. Rather, field tests for hard-to-reach populations, scheduled for 2017 in Puerto Rico and American Indian Reservations in North Dakota, South Dakota, and Washington State, were cancelled. John Thompson, *U.S. Census Bureau Announces Changes to 2017 Field Tests*, U.S. CENSUS BUREAU, Oct. 18, 2016. Two of three End-to-End Census Tests – "dress rehearsals" – were also cancelled. Only one dress rehearsal was done: in Providence County, Rhode Island. And that lone End-to-End Census Test was

flawed in both its process (multiple last-minute changes that may have skewed the lessons learned and resulting adjustments) and substance (the census survey did not include the citizenship question). Michael Wines, *Census Officials Say Rhode Island Rehearsal Is Going Well. Not Everyone Agrees*, N.Y. TIMES, April 28, 2018.

Individually, any one of the problems above – the radical change in the entire approach, the digital divide, the cybersecurity concerns, the inadequate testing – would be a significant threat to a proper census. The total weight of the challenges put the entire decennial census at "High Risk." Adding the untimely and completely untested citizenship question to the 2020 census would exponentially multiply the risks. There is no reason to put the 2020 census in such jeopardy, especially when everyone depends on having census data that are fair, accurate, and complete.

As previously noted, every charitable nonprofit, business, government, and person in America depends on and will be influenced by the census count for more than a decade. Given the untimely disclosure that citizenship would be a subject of the census, the litany of evidence that a citizenship question would lead to a measurably worse undercount, the lack of any finding by the Secretary that there are "new circumstances" that "necessitate" adding a citizenship question to the census, and the multitude of the Secretary's arbitrary and capricious acts, it would be fundamentally unfair and harmful to the American people and our Nation to

allow the citizenship question to be added to the 2020 census.

CONCLUSION

The Court should affirm the district court's decision and allow the census to proceed without the untimely and untested citizenship question.

Respectfully submitted,

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